

CRS Report for Congress

Congress's Contempt Power: A Sketch

August 1, 2007

Morton Rosenberg
Specialist in American Public Law
American Law Division

Todd B. Tatelman
Legislative Attorney
American Law Division



**Prepared for Members and
Committees of Congress**

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 01 AUG 2007		2. REPORT TYPE		3. DATES COVERED 00-00-2007 to 00-00-2007	
4. TITLE AND SUBTITLE Congress's Contempt Power: A Sketch				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Congressional Research Service, The Library of Congress, 101 Independence Ave, Washington, DC, 20540-7500				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 22	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

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Summary

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This report outlines the source of the contempt power, reviews major developments in the case law, and analyzes the procedures associated with each of the three different types of contempt proceedings. A more fully developed and detailed version, complete with sources and references, can be found in CRS Report RL34097, *Congress's Contempt Power: Law, History, Practice, and Procedure*, by Morton Rosenberg and Todd B. Tatelman.

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Congress's Power to Investigate

The power of Congress to punish for contempt is inextricably related to the power of Congress to investigate. Generally speaking, Congress's authority to investigate and obtain information, including but not limited to confidential information, is extremely broad. While there is no express provision of the Constitution or specific statute authorizing the conduct of congressional oversight or investigations, the Supreme Court has firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress. The broad legislative authority to seek and enforce informational demands was unequivocally established in two Supreme Court rulings arising out of the 1920's Teapot Dome scandal.

In *McGrain v. Daugherty*,¹ which arose out of the exercise of the Senate's inherent contempt power, the Supreme Court described the power of inquiry, with the accompanying process to enforce it, as "an essential and appropriate auxiliary to the legislative function." In *Sinclair v. United States*,² a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts ... and shall respectfully decline to answer any questions propounded by your committee." The Supreme Court upheld

¹ 273 U.S. 135, 174-75 (1927).

² 279 U.S. 263 (1929).

the witness's conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."

Subsequent Supreme Court rulings have consistently reiterated and reinforced the breadth of Congress's investigative authority. For example, in *Eastland v. United States Servicemen's Fund*,³ the Court explained that "[t]he scope of [Congress's] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." In addition, the Court in *Watkins v. United States*,⁴ described the breadth of the power of inquiry. According to the Court, Congress's power "to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." The Court did not limit the power of congressional inquiry to cases of "wrongdoing." It emphasized, however, that Congress's investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, the Court stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste." "[T]he first Congresses," held "inquiries dealing with suspected corruption or mismanagement by government officials" and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered." Accordingly, the Court now clearly recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."

The inherent contempt power is not specified in a statute or constitutional provision, but has been deemed implicit in the Constitution's grant to Congress of all legislative powers. In an inherent contempt proceeding, the offender is tried at the bar of the House or Senate and can be held in custody until such time as the contemnor provides the testimony or documents sought, or until the end of the session. Inherent contempt was most often used as a means of coercion, not punishment. A statutory criminal contempt provision was first enacted by Congress in 1857, in part because of the inadequacies of proceedings under the inherent power. In cases of criminal contempt, the offender is cited by the subcommittee, the committee, and the full House or Senate, with subsequent indictment by a grand jury and prosecution by the U.S. Attorney. Criminal contempt, unlike inherent contempt, is intended as a means of punishing the contemnor for non-compliance rather than to obtain the information sought. A statutory civil contempt procedure, applicable only to the Senate, was enacted in 1978. Under that procedure, a witness, who refuses to testify before a Senate committee or provide documents sought by the committee can, after being served with a court order, be held in contempt of court

³ 421 U.S. 491, 504, n. 15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1960)).

⁴ 354 U.S. 178, 187 (1957).

and incarcerated until he agrees to testify. Moreover, the House and Senate have authorized standing or special committees to seek civil enforcement of subpoenas.

Early History of Congressional Contempt

While the contempt power was exercised both by the English Parliament and by the American colonial assemblies, Congress's first assertion of its contempt authority occurred in 1795, shortly after the ratification of the Constitution. At the time, three Members of the House of Representatives reported that they had been offered what they interpreted to be a bribe by men named Robert Randall and Charles Whitney. The House of Representatives interpreted these allegations as sufficient evidence of an attempt to corrupt its proceedings and reported a resolution ordering their arrest and detention by the Sergeant-at-Arms, pending further action by the House. The matter was then referred to a special Committee on Privileges which reported out a resolution recommending that formal proceedings be instituted against Messrs. Randall and Whitney at the bar of the House. In addition, the resolution provided that the accused be questioned by written interrogatories submitted by the Speaker of the House with both the questions and the answers entered into the House minutes. The resolution also provided that individual Members could submit written questions to the accused.⁵

Anderson v. Dunn. In 1821, the Supreme Court was faced with interpreting the scope of Congress's contempt power.⁶ The case arose when Representative Louis Williams of North Carolina introduced a letter before the House from a John Anderson, which Representative Williams interpreted as an attempt to bribe him. Following its 1795 precedent, the House adopted a resolution ordering the Sergeant-at-Arms to arrest Mr. Anderson bring him before the bar of the House. Upon Mr. Anderson's arrest, however, a debate erupted on the floor of the House as the motion for referral to the Committee on Privileges to adopt procedures was considered. Several Members objected to the House's assertion of an inherent contempt power. They argued, as the minority Senators had in Mr. Duane's contempt, that neither the Constitution nor the general laws afforded the Congress such an inherent power to punish for actions that occurred elsewhere. Relying on the 1795 precedent and examples from the British Parliament and state legislatures, the Committee was formed and it adopted a resolution requiring Mr. Anderson to be brought before the bar of the House for questioning by the Speaker. At his appearance, Mr. Anderson, like Mr. Randall and Mr. Whitney before him, was afforded counsel and permitted to present the testimony of eleven witnesses. Ultimately, Mr. Anderson was found in contempt of Congress and was ordered to be reprimanded by the Speaker for the "outrage he committed" and discharged into the custody of the Sergeant-at-Arms.

Mr. Anderson subsequently filed suit against Mr. Thomas Dunn, the Sergeant-at-Arms of the House, alleging assault, battery, and false imprisonment. Mr. Dunn responded by asserting that he was carrying out the lawful orders of the House of

⁵ See CRS Report RL34097, *Congress's Contempt Power: Law, History, Practice, and Procedure*, by Morton Rosenberg and Todd B. Tatelman, 4-7 (providing further details, examples, citations, and explanations) [hereinafter CRS Contempt Report].

⁶ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

Representatives. The Supreme Court heard the case in February of 1821 and concluded that the Congress possessed the inherent authority to punish for contempt and dismissed the charges against Mr. Dunn. The Court noted that while the Constitution does not explicitly grant either House of Congress the authority to punish for contempt, except in situations involving its own Members, such a power is necessary for Congress to protect itself. The Court asserted that if the House of Representatives did not possess the power of contempt it would “be exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it.”

The Court’s decision in *Anderson* does not define the specific actions that would constitute contempt; rather, it adopted a deferential posture, noting that:

it is only necessary to observe that there is nothing on the facts of the record from which it can appear on what evidence the warrant was issued and we do not presume that the House of Representatives would have issued it without fully establishing the facts charged on the individual.⁷

The *Anderson* decision indicates that Congress’s contempt power is centered on those actions committed in its presence that obstruct its deliberative proceedings. The Court noted that Congress could supplement this power to punish for contempt committed in its presence by enacting a statute, which would prohibit “all other insults which there is any necessity for providing.”

The Court in *Anderson* also endorsed the existing parliamentary practice that the contemnor could not be held beyond the end of the legislative session. According to the Court,

[s]ince the existence of the power that imprisons is indispensable to its continuance, and although the legislative power continues perpetual, the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.⁸

Kilbourn v. Thompson.⁹ In 1876, the House established a select committee to investigate the collapse of Jay Cooke & Company, a real estate pool in which the United States had suffered losses as a creditor. The committee was, by resolution, given the power to subpoena both persons and records pursuant to its investigation. Acting under its authority, the committee issued a *subpoena duces tecum* to one Hallet Kilbourn, the manager of the real estate pool. When Mr. Kilbourn refused to produce certain papers or answer questions before the committee he was arrested and tried under the House’s inherent contempt power. The House adjudged Mr. Kilbourn in contempt and ordered him detained by the Sergeant-at-Arms until he purged himself of contempt by releasing the requested documents and answering the committee’s questions.

⁷ *Id.* at 234.

⁸ *Id.* at 231.

⁹ 103 U.S. 168 (1881).

Mr. Kilbourn filed a suit against the Speaker, the members of the committee, and the Sergeant-at-Arms for false arrest. The lower court held in favor of the defendant dismissing the suit. Mr. Kilbourn appealed, and the Supreme Court reversed, holding that Congress did not have a general power to punish for contempt. While the Court appeared to recognize that Congress possessed an inherent contempt power, it declined to follow *Anderson v. Dunn*'s expansive view of Congress's authority.

The Court held that the investigation into the real estate pool was not undertaken by the committee pursuant to one of Congress's constitutional responsibilities, but rather was an attempt to pry into the personal finances of private individuals, a subject that could not conceivably result in the enactment of valid legislation. According to the Court, because Congress was acting beyond its constitutional responsibilities, Mr. Kilbourn was not legally required to answer the questions asked of him. Finally, in *dicta*, the Court indicated that the contempt power might be upheld where Congress was acting pursuant to certain specific constitutional prerogatives, such as disciplining its Members, judging their elections, or conducting impeachment proceedings.

Although the precedential value of *Kilbourn* has been significantly limited by subsequent case law, the case continues to be cited for the proposition that the House has no power to probe into private affairs, such as the personal finances of an individual, on which legislation could not be enacted. The doubts raised by *Kilbourn* about the scope of Congress's contempt power have essentially been removed by later cases sanctioning the use of the power in investigations conducted pursuant to Congress's authority to discipline its Members, to judge the elections of its Members, and, most importantly, to probe the business and conduct of individuals to the extent that the matters are subject to congressional regulation. For example, in *McGrain v. Daugherty*, which involved a Senate investigation into the claimed failure of the Attorney General to prosecute certain antitrust violations, a subpoena was issued to the brother of the Attorney General, Mallie Daugherty, the president of an Ohio bank. When Daugherty refused to comply, the Senate exercised its inherent contempt power and ordered its Sergeant-at-Arms to take him into custody. The grant of a writ of habeas corpus was appealed to the Supreme Court. The Court's opinion in the case considered the investigatory and contempt powers of Congress to be implicit in the grant of legislative power. The Court distinguished *Kilbourn*, which was an investigation into purely personal affairs, from the instant case, which was a probe of the operation of the Department of Justice. According to the Court, the subject was plainly "one on which legislation could be had and would be materially aided by information the investigation was calculated to elicit."¹⁰ The Court in *McGrain* was willing to presume that the investigation had been undertaken to assist the committee in its legislative efforts.

Inherent Contempt

Congress's inherent contempt power is not specifically granted by the Constitution, but is considered necessary to investigate and legislate effectively. The

¹⁰ *Id.* at 177.

validity of the inherent contempt power was upheld in the early Supreme Court decision in *Anderson v. Dunn* and reiterated in *McGrain v. Daugherty*. Under the inherent contempt power the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail. The purpose of the imprisonment or other sanction may be either punitive¹¹ or coercive.¹² Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period (but not, at least by the House, beyond the end of a session of the Congress) until he agrees to comply.

When a witness is cited for contempt under the inherent contempt process, prompt judicial review appears to be available by means of a petition for a writ of habeas corpus. In such a habeas proceeding, the issues decided by the court might be limited to (a) whether the House or Senate acted in a manner within its jurisdiction, and (b) whether the contempt proceedings complied with minimum due process standards. While Congress would not have to afford a contemnor the whole panoply of procedural rights available to a defendant in criminal proceedings, notice and an opportunity to be heard would have to be granted. Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure (e.g., pertinency of the question asked to the committee's investigation) might be mandated by the due process clause in the case of inherent contempt proceedings.

Although many of the inherent contempt precedents have involved incarceration of the contemnor, there may be an argument for the imposition of monetary fines as an alternative. Such a fine would potentially have the advantage of avoiding a court proceeding on habeas corpus grounds, as the contemnor would never be jailed or detained. Drawing on the analogous authority that courts have to inherently impose fines for contemptuous behavior, it appears possible to argue that Congress, in its exercise of a similar inherent function could impose fines as opposed to incarceration. Additional support for this argument appears to be contained in *dicta* from the 1821 Supreme Court decision in *Anderson v. Dunn*. In addition, *Kilbourn v. Thompson*, suggested that in certain cases where the Congress had authority to investigate, it may compel testimony in the same manner and by use of the same means as a court of justice in like cases.

In comparison with the other types of contempt proceedings, inherent contempt has the distinction of not requiring the cooperation or assistance of either the executive or judicial branches. The House or Senate can, on its own, conduct summary proceedings and cite the offender for contempt. Furthermore, although the contemnor can seek judicial review by means of a petition for a writ of habeas corpus, the scope of such review may be relatively limited, compared to the plenary review accorded by the courts in cases of conviction under the criminal contempt statute.

There are also certain limitations on the inherent contempt process. Although the contemnor can be incarcerated until he agrees to comply with the subpoena, imprisonment may not extend beyond the end of the current session of Congress.

¹¹ *Jurney v. MacCracken*, 294 U.S. 125, 147 (1935).

¹² *McGrain v. Daugherty*, 273 U.S. at 161.

Moreover, inherent contempt has been described as “unseemly,” cumbersome, time-consuming, and relatively ineffective, especially for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar. Because of these drawbacks, the inherent contempt process has not been used by either body since 1934. Proceedings under the inherent contempt power might be facilitated, however, if the initial fact-finding and examination of witnesses were to be held before a special committee — which could be directed to submit findings and recommendations to the full body — with only the final decision as to guilt being made by the full House or Senate. Although generally the proceedings in inherent contempt cases appear to have been conducted at the bar of the House of Congress involved, in at least a few instances proceedings were conducted initially or primarily before a committee, but with the final decision as to whether to hold the person in contempt being made by the full body. Past practice and the Supreme Court’s 1993 decision in *Nixon v. United States*,¹³ upholding the Senate’s ability to conduct impeachment trials in committee, appears to provide support for the utilization of such committees to avoid lengthy floor proceedings.¹⁴

Statutory Criminal Contempt

Between 1795 and 1857, 14 inherent contempt actions were initiated by the House and Senate, eight of which can be considered successful in that the contemnor was meted out punishment, agreed to testify or produce documents. Such inherent contempt proceedings, however, involved a trial at the bar of the chamber concerned and, therefore, were seen by some as time-consuming, cumbersome, and in some instances ineffective — because punishment could not be extended beyond a House’s adjournment date. In 1857, a statutory criminal contempt procedure was enacted, largely as a result of a particular proceeding brought in the House of Representatives that year. The statute provides for judicial trial of the contemnor by a United States Attorney rather than a trial at the bar of the House or Senate. It is clear from the floor debates and the subsequent practice of both Houses that the legislation was intended as an *alternative* to the inherent contempt procedure, not as a substitute for it. A criminal contempt referral was made in the case of John W. Wolcott in 1858, but in the ensuing two decades after its enactment most contempt proceedings continued to be handled at the bar of the House, rather than by the criminal contempt method, apparently because Members felt that they would not be able to obtain the desired information from the witness after the criminal proceedings had been instituted. With only minor amendments, those statutory provisions are codified today as 2 U.S.C. §§ 192 and 194, which state:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than [\$100,000] nor

¹³ 506 U.S. 224 (1993).

¹⁴ See CRS Contempt Report, *supra* note 8 at 12-20.

less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.¹⁵

Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.¹⁶

The legislative debate over the criminal contempt statute reveals that it was prompted by the obstruction of a House select committee's investigation into allegations of misconduct that had been made against several Members of the House of Representatives. According to reports, the investigation was hindered by the refusal of a newspaper reporter, James W. Simonton, to provide answers to certain questions posed by the committee. The select committee responded by reporting a resolution citing Mr. Simonton for contempt, as well as introducing a bill that was intended "to more effectually ... enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony." It appears that there were no printed House or Senate committee reports on the measure, though it was considered in the House by the select committee and in the Senate by the Judiciary Committee.

Under 2 U.S.C. § 192, a person who has been "summoned as a witness" by either House or a committee thereof to testify or to produce documents and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to \$100,000 and imprisonment for up to one year. 2 U.S.C. § 194 establishes the procedure to be followed by the House or Senate if it chooses to refer a recalcitrant witness to the courts for criminal prosecution rather than try him at the bar of the House or Senate. Under the procedure outlined in section 194, "the following steps precede judicial proceedings under [the statute]: (1) approval by committee; (2) calling up and reading the committee report on the floor; (3) either (if Congress is in session) House approval of a resolution authorizing the Speaker to certify the report to the U.S. Attorney for prosecution, or (if Congress is not in session) an independent determination by the Speaker to certify the report; [and] (4) certification by the Speaker to the appropriate U.S. Attorney for prosecution.

¹⁵ 2 U.S.C. § 192 (2000). As a result of congressional classification of offenses, the penalty for contempt of Congress is a Class A misdemeanor; thus, the \$1,000 maximum fine under § 192 has been increased to \$100,000. *See* 18 U.S.C. §§ 3559, 3571 (2000).

¹⁶ 2 U.S.C. § 194 (2000).

The criminal contempt statute and corresponding procedure are punitive in nature. It is used when the House or Senate wants to punish a recalcitrant witness and, by doing so, to deter others from similar contumacious conduct. The criminal sanction is not coercive because the witness generally will not be able to purge himself by testifying or supplying subpoenaed documents after he has been voted in contempt by the committee and the House or Senate. Consequently, once a witness has been voted in contempt, he lacks an incentive for cooperating with the committee. However, although the courts have rejected arguments that defendants had purged themselves, in a few instances the House has certified to the U.S. Attorney that further proceedings concerning contempts were not necessary where compliance with subpoenas occurred after contempt citations had been voted but before referral of the cases to grand juries.

Under the statute, after a contempt has been certified by the President of the Senate or the Speaker, it is the “duty” of the United States Attorney “to bring the matter before the grand jury for its action.” It remains unclear whether the “duty” of the U.S. Attorney to present the contempt to the grand jury is mandatory or discretionary.¹⁷

The Position of the Department of Justice on the Use of Inherent and/or Criminal Contempt of Congress Against the Executive Branch

The Department of Justice (DOJ) has taken the position that Congress cannot, as a matter of statutory or constitutional law, invoke either its inherent contempt authority or the criminal contempt of Congress procedures against an executive branch official acting on instructions by the President to assert executive privilege in response to a congressional subpoena. This view is most fully articulated in two opinions by the DOJ’s Office of Legal Counsel (OLC) from the mid-1980s,¹⁸ and has been the basis of several recent claims with respect to pending congressional investigations.

The position of the DOJ was prompted by the outcome of an investigation by two House committees into the Environmental Protection Agency’s (EPA) implementation of provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund). Subpoenas were issued by both committees seeking documents contained in EPA’s litigation files. At the direction of President Reagan, EPA Administrator Burford claimed executive privilege over the documents and refused to disclose them to the committees on the grounds that they were “enforcement sensitive.” A subcommittee and ultimately the full House Committee on Public Works and Transportation, approved a criminal

¹⁷ See CRS Contempt Report, *supra* note 8 at 20-27.

¹⁸ See *Prosecution for the Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 U.S. Op. Off. Legal Counsel 101 (1984) [hereinafter Olson Memo]; see also *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 U.S. Op. Off. Legal Counsel 68 (1986) [hereinafter Cooper Memo].

contempt of Congress citation and forwarded it to the full House for its consideration. On December 16, 1982, the full House of Representatives voted, 259-105, to adopt the contempt citation. Before the Speaker of the House could transmit the citation to the United States Attorney for the District of Columbia for presentation to a grand jury, the DOJ filed a lawsuit seeking to enjoin the transmission of the citation and to have the House's action declared unconstitutional as an intrusion into the President's authority to withhold such information from the Congress. According to the DOJ, the House's action imposed an "unwarranted burden on executive privilege" and "interferes with the executive's ability to carry out the laws."

The District Court for the District of Columbia dismissed the DOJ's suit on the grounds that judicial intervention in executive-legislative disputes "should be delayed until all possibilities for settlement have been exhausted."¹⁹ In addition, the court noted that ultimate judicial resolution of the validity of the President's claim of executive privilege could only occur during the course of the trial for contempt of Congress. The DOJ did not appeal the court's ruling, opting instead to resume negotiations, which resulted in full disclosure and release of all the subpoenaed documents to the Congress. Throughout the litigation and subsequent negotiations, however, the U.S. Attorney refused to present the contempt citation to a grand jury for its consideration on the grounds that, notwithstanding the mandatory language of the criminal contempt statute, he had discretion with respect to whether to make the presentation. The issue was never resolved because the ultimate settlement agreement included a withdrawal of the House's contempt citation.

In its initial 1984 opinion, OLC revisited the statutory, legal, and constitutional issues that were not judicially resolved by the Superfund dispute. The opinion concluded that, as a function of prosecutorial discretion, a U.S. Attorney is not required to refer a contempt citation to a grand jury or otherwise to prosecute an executive branch official who is carrying out the President's direction to assert executive privilege. Next, the OLC opinion determined that a review of the legislative history of the 1857 enactment of the criminal contempt statute and its subsequent implementation demonstrates that Congress did not intend the statute to apply to executive officials who carry out a presidential directive to assert executive privilege. Finally, as a matter of constitutional law, the opinion concludes that simply the threat of criminal contempt would unduly chill the President's ability to effectively protect presumptively privileged executive branch deliberations. According to the OLC opinion:

The President's exercise of this privilege, particularly when based upon the written legal advice of the Attorney General, is presumptively valid. Because many of the documents over which the President may wish to assert a privilege are in the custody of a department head, a claim of privilege over those documents can be perfected only with the assistance of that official. If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified. Because Congress has other methods available to test the validity of a privilege

¹⁹ See generally, *United States v. United States House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

claim and to obtain the documents that it seeks, even the threat of a criminal prosecution for asserting the claim is an unreasonable, unwarranted, and therefore intolerable burden on the exercise by the President of his functions under the Constitution.²⁰

The 1984 opinion focuses almost exclusively on the criminal contempt statute, as that was the authority invoked by Congress in the Superfund dispute. In a brief footnote, however, the opinion contains a discussion of Congress's inherent contempt power, summarily concluding that the same rationale that makes the criminal contempt statute inapplicable and unconstitutional as applied to executive branch officials apply to the inherent contempt authority:

We believe that this same conclusion would apply to any attempt by Congress to utilize its inherent "civil" contempt powers to arrest, bring to trial, and punish an executive official who asserted a Presidential claim of executive privilege. The legislative history of the criminal contempt statute indicates that the reach of the statute was intended to be coextensive with Congress' inherent civil contempt powers (except with respect to the penalties imposed). Therefore, the same reasoning that suggests that the statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well.²¹

The 1986 OLC opinion reiterates the 1984 reasoning adding the observation that the power had not been used since 1935 (at that time over 50 years), and that "it seems unlikely that Congress would dispatch the Sergeant-at-Arms to arrest and imprison an executive branch official who claimed executive privilege." The 1986 OLC opinion also suggests that then current Supreme Court opinions indicated that it was "more wary of Congress exercising judicial authority" and, therefore, might revisit the question of the continued constitutional validity of the inherent contempt power.

Factual, legal, and constitutional aspects of these OLC opinions are open to question and potentially limitations. For example, with respect to the argument that a U.S. Attorney cannot be statutorily required to submit a contempt citation to a grand jury, despite the plain language of the law, such a statement appears to be analogous to a grant of so-called "pocket immunity" by the President to anyone who asserts executive privilege on his behalf. The courts have concluded that the government, or in this case the President, may informally grant immunity from prosecution, which is in the nature of a contract and, therefore, its effect is strongly influenced by contract law principles. Moreover, principles of due process require that the government adhere to the terms of any immunity agreement it makes. It appears that a President has implicitly immunized executive branch officials from violations of congressional enactments at least once — in 1996, during a dispute over the constitutionality of a statute that made it a requirement for all public printing to be done by the Government Printing Office. At the time, the DOJ, in an opinion from OLC, argued that the requirement was unconstitutional on its face, directed the executive branch departments not to comply with the statute as passed by Congress, and noted that executive branch officials who are involved in making decisions that

²⁰ See Olson Memo, *supra* note 18 at 102.

²¹ *Id.* at 140, n. 42 (internal citation omitted).

violate the statute face little to no litigation risk, including, it appears, no risk of prosecution under the Ant-Deficiency Act, for which the DOJ is solely responsible. Such a claim of immunization in the contempt context, whether express or implicit, would raise significant constitutional questions. While it is true that the President can immunize persons from criminal prosecution, it does not appear that he has authority to immunize a witness from a congressional inherent contempt proceeding. Arguably, an inherent contempt proceeding takes place wholly outside the criminal code, is not subject to executive execution of the laws and prosecutorial discretion, and thus, appears completely beyond the reach of the executive branch. Furthermore, as previously indicated, inherent contempt, unlike criminal contempt, is not intended to punish, but rather to coerce compliance with a congressional directive. Thus, a finding of inherent contempt against an executive branch officials would not appear to be subject to the President's Pardon power²² — as an inherent contempt arguably is not an “offense against the United States,” but rather is an offense against a House of Congress. Likewise, it appears that the same arguments would be applicable to a potential civil contempt by Congress.

The assertion that the legislative history of the 1857 statute establishing the criminal contempt process demonstrates that it was not intended to be used against executive branch official does not appear to be supported by the historical record. The floor debates leading to the enactment of the statute make it clear that the legislation was intended as an alternative to, not a substitute for, the inherent contempt authority. This understanding has been reflected in numerous Supreme Court opinions upholding the use of the criminal contempt statute. A close review of the floor debate indicates that Representative H. Marshall expressly pointed out that the broad language of the bill “proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of this House by an attempt to corrupt a Representative of the people.”

Moreover, language from the floor debate indicates that Congress was aware of the effect that this language would have on the ability of persons to claim privileges before Congress. Specifically, the sponsor of the bill, Representative Orr, was asked about the potential instances in which the proposed legislation might interfere with recognized common law and other governmental privileges, such as the attorney-client privilege, to support an investigation such as one that probed “the propriety of a secret service fund to be used upon the discretion of the executive department,” or to support inquiries about “diplomatic matters.” Representative Orr responded that the House has and would continue to follow the practice of the British Parliament, which “does not exempt a witness from testifying upon any such ground. He is not excused from testifying there. That is the common law of Parliament.” Later in the same debate, a proposed amendment to expressly recognize the attorney-client privilege in the statute was overwhelmingly defeated.

With respect to the secret service fund, Representative Orr explained “that this House has already exercised the power and authority of forcing a disclosure as to what disposition had been made for the secret-service fund. And it is right and

²² U.S. CONST. Art. II, § 2 (stating that the President “shall have the Power to grant Reprieves and Pardons for Offenses Against the United States.”).

proper that it should be so. Under our Government — under our system of laws — under our Constitution — I should protest against the use of any money by an executive authority, where the House had not the right to know how every dollar had been expended, and for what purpose.” Representative Orr’s reference was to a contentious investigation in 1846, regarding charges that Daniel Webster, while Secretary of State, had improperly disbursed monies from a secret contingency fund used by the President for clandestine foreign operations. The charges led the committee to issue subpoenas to former Presidents John Quincy Adams and John Tyler. President Polk sent the House a list of the amounts in the contingent fund for the relevant period, which was prior to his term, but refused to furnish documentation of the uses that had been made of the expenditures on the grounds that a sitting President should not publically reveal the confidences of his predecessors. President Polk’s refusal to provide the information was mooted by the actions of the two investigatory committees established by the House. Former President Tyler testified and former President Adams filed a deposition detailing the uses of the fund during their Administrations. In addition, President Polk’s Secretary of State, James Buchanan, was subpoenaed and testified. Ultimately, Mr. Webster was found innocent of any wrongdoing. From these references, it appears that the House was, in 1857, sensitive to and cognizant about its oversight and investigative prerogatives vis-a-vis the executive branch. It therefore appears arguable that in the context of the debate, the contempt statute was not intended to preclude the House’s ability to engage in oversight of the executive branch.

Finally, OLC’s contention that the criminal contempt statute has only been used once, in the Burford/Superfund dispute, appears to be based on the fact that the contempt of Anne Burford was the only contempt voted on by the full House of Representatives. Significantly, prior to the Superfund dispute, committees and subcommittees of the House of Representatives had voted contempt citations against Secretary of State Henry Kissinger (1975); Secretary of Commerce Rogers C. B. Morton (1975); Secretary of Health, Education, and Welfare Joseph A. Califano, Jr. (1978); Secretary of Energy Charles Duncan (1980); Secretary of Energy James B. Edwards (1981); Secretary of the Interior James Watt (1982), and Attorney General William French Smith (1983). Since the Superfund dispute, contempt citations have been voted against White House Counsel John M. Quinn (1996) and Attorney General Janet Reno (1998). In every instance, save for John M. Quinn, a claim of executive privilege was asserted, and in each instance there was ultimately either full or substantial compliance with the demands of the committee that had issued the subpoena.²³

Civil Contempt

Civil Contempt in the Senate. As an alternative to both the inherent contempt power of each House and the criminal contempt statutes, in 1978 Congress enacted a civil contempt procedure, which is applicable only to the Senate. The statute gives the U.S. District Court for the District of Columbia jurisdiction over a civil action to enforce, secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order

²³ See CRS Contempt Report, *supra* note 8 at 27-33.

issued by the Senate or a committee or subcommittee. Generally such a suit will be brought by the Senate Legal Counsel, on behalf of the Senate or a Senate committee or subcommittee.

Pursuant to the statute, the Senate may “ask a court to directly order compliance with [a] subpoena or order, or they may merely seek a declaration concerning the validity of [the] subpoena or order. By first seeking a declaration, [the Senate would give] the party an opportunity to comply before actually [being] ordered to do so by a court.” It is solely within the discretion of the Senate whether or not to use such a two-step enforcement process.

Regardless of whether the Senate seeks the enforcement of, or a declaratory judgement concerning a subpoena, the court will first review the subpoena’s validity. If the court finds that the subpoena “does not meet applicable legal standards for enforcement,” it does not have jurisdiction to enjoin the congressional proceeding. Because of the limited scope of the jurisdictional statute and because of Speech or Debate Clause immunity for congressional investigations, “when the court is petitioned solely to enforce a congressional subpoena, the court’s jurisdiction is limited to the matter Congress brings before it, that is whether or not to aid Congress in enforcing the subpoena. If the individual still refuses to comply, he may be tried by the court in summary proceedings for contempt of court, with sanctions being imposed to coerce their compliance.

Without affecting the right of the Senate to institute criminal contempt proceedings or to try an individual for contempt at the bar of the Senate, this procedure gives the Senate the option of a civil action to enforce a subpoena. Civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the contemnor. Unlike criminal contempt, in a civil contempt, sanctions (imprisonment and/or a fine) can be imposed until the subpoenaed party agrees to comply thereby creating an incentive for compliance; namely, the termination of punishment. Since the statute’s enactment in 1979, the Senate has authorized the Office of Senate Legal Counsel to seek civil enforcement of a document subpoena at least 6 times, the last in 1995. None has been against executive branch officials.

The civil contempt process is arguably more expeditious than a criminal proceeding, where a court may more closely scrutinize congressional procedures and give greater weight to the defendant’s constitutional rights. The civil contempt procedure also provides an element of flexibility, allowing the subpoenaed party to raise possible constitutional and other defenses (e.g., the privilege against self-incrimination, lack of compliance with congressional procedures, or an inability to comply with the subpoena) without risking a criminal prosecution.

Civil contempt, however, has limitations. Most notable is that the statute granting jurisdiction to the courts to hear such cases is, by its terms, inapplicable in the case of a subpoena issued to an officer or employee of the federal government acting in their official capacity. Enacted as part of the Ethics in Government Act of 1978, early drafts of the civil contempt statute did not include an exception for federal government officers and employees acting within the scope of their duties. It appears that the section was drafted primarily in response to the District Court’s

dismissal, for lack of jurisdiction, of an Ervin Committee's request for a declaratory judgment regarding the lawfulness of its subpoena of President Nixon's tape recordings. Thus, one of the purposes of the statute was to expressly confer jurisdiction upon courts to determine the validity of congressional requests for information.

During the course of the debates regarding this legislation, the executive branch strongly opposed conferring jurisdiction upon the federal courts to decide such sensitive issues between Congress and the executive branch. Testifying before a subcommittee of the Senate Committee on Governmental Operations, then-Assistant Attorney General Antonin Scalia argued that weighing the legislature's need for information against the executive's need for confidentiality is "the very type of 'political question' from which ... the courts [should] abstain." In response, Congress amended the proposed legislation excluding from its scope federal officers and employees acting in their official capacity. However, as noted in a report from the House Judiciary Committee in 1988, the exclusion was to apply only in cases in which the President had directed the recipient of the subpoena not to comply with its terms.²⁴

Civil Contempt in the House of Representatives. While the House of Representatives cannot pursue actions under the Senate's civil contempt statute discussed above, there are numerous examples of the House, by resolution, affording special investigatory committees authority not ordinarily available to its standing committees. Such special panels have often been vested with staff deposition authority, and given the particular circumstances, special panels have also been vested with the authority to obtain tax information, as well as the authority to seek international assistance in information gathering efforts abroad. In addition, several special panels have been specifically granted the authority to seek judicial orders and participate in judicial proceedings.

For example, in 1987, the House authorized the creation of a select committee to investigate the covert arms transactions with Iran (Iran-Contra). As part of this resolution, the House provided the following authorization:

(3) The select committee is authorized ... to require by subpoena or otherwise the attendance and testimony of such witnesses ... as it deems necessary, including all intelligence materials however classified, White House materials, ... and to obtain evidence in other appropriate countries with the cooperation of their governments. ... (8) The select committee shall be authorized to respond to any judicial or other process, or to make *any applications to court*, upon consultation with the Speaker consistent with [House] rule L.²⁵

The combination of broad subpoena authority, that expressly encompassed the White House, and the ability to make "any applications to court," arguably suggests that the House contemplated the possibility that a civil suit seeking enforcement of a subpoena against a White House official was possible. By virtue of the resolution's

²⁴ See CRS Contempt Report, *supra* note 8 at 33-37.

²⁵ See H.Res. 12, 100th Cong., 1st Sess., §§ 3, 8 (1987) (emphasis added).

language, it appears reasonable to conclude that the House decided to leave the decision in the hands of the select committee, consistent with House Rule L (now House Rule VIII governing subpoenas). It may be noted, then, that while the House select committee did not attempt to seek judicial enforcement of any of its subpoenas, the authorization resolution did not preclude the possibility. A review of modern House precedents indicates at least 5 other special or select committees that have been granted, via House resolution, both subpoena authority as well as the ability to seek and participate in judicial actions.

A potential hurdle to a resolution by the House of Representatives authorizing the pursuit of a civil court order is the jurisdiction of the federal courts. Such jurisdiction, specifically federal district court jurisdiction, where a civil action for enforcement of a congressional subpoena would be brought, is derived from both Article III of the Constitution and federal statute. Article III of the Constitution states, in relevant part, that “[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States” The Supreme Court has interpreted the language “arising under” broadly, essentially permitting federal jurisdiction to be found whenever federal law “is a potentially important ingredient of a case.” Conversely, the federal-question jurisdiction statute, first enacted in 1875, while containing almost identical language to Article III, has been interpreted by the Court to be much narrower in scope. But, the fact that the statutory jurisdiction provided by Congress is narrower than the Constitution’s grant of judicial power may give rise to an argument that the statutory grant of jurisdiction cannot be used by the House should it merely adopt a resolution authorizing a subpoena enforcement proceeding to be brought in court. Following this argument to its conclusion might suggest that both Houses of Congress must pass a law, signed by the President, which authorizes a civil enforcement action to be brought in federal district court because a mere one-House resolution will not suffice to provide such jurisdiction.

We have found no court or commentator that has expressly adopted this argument. It therefore remains unclear whether the existing statutory language for jurisdiction can be definitively said to be inadequate. Rather, the limited Supreme Court and other federal court precedent that exists may be read to suggest that the current statutory basis is sufficient to establish jurisdiction for a civil action of the type contemplated here if the representative of the congressional committee is specifically authorized by a House of Congress to act.

In 1928, the Supreme Court decided *Reed v. The County Commissioners of Delaware County, Pennsylvania*,²⁶ which involved a special committee of the United States Senate charged, by Senate resolution, with investigating the means used to influence the nomination of candidates for the Senate. The special committee was authorized to “require by subpoena or otherwise the attendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation.” During the course of its investigation into the disputed election of William B. Wilson of Pennsylvania to the Senate, the committee sought to obtain the “boxes, ballots, and other things used in connection

²⁶ 277 U.S. 376 (1928).

with the election.” The County Commissioners, who were the legal custodians of said materials, refused to provide them to the committee, thus necessitating the lawsuit. The Supreme Court, after affirming the powers of the Senate to “obtain evidence related to matter committed to it by the Constitution” and having “passed laws calculated to facilitate such investigations,” nevertheless held that it was without jurisdiction to decide the case. The Senate had relied on the resolution’s phrase “such other acts as may be necessary” to justify its authority to bring such a suit. According to the Court, however, that phrase “may not be taken to include everything that under any circumstances might be covered by its words.” As a result, the Court held that “the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. Petitioners are not ‘authorized by law to sue.’” The Court in *Reed* made no mention of the jurisdictional statute that existed at the time. Rather, the Court appears to have relied on the fact that the Senate did not specifically authorize the committee to sue; therefore, absent particular language granting the power to sue in court, there can be no basis for judicial jurisdiction over such a suit. Read in this manner, *Reed* appears to suggest that had the Senate resolution specifically mentioned the power to sue, the Court may have accepted jurisdiction and decided the case on its merits. Such a reading of *Reed* is supported by a recent district court ruling involving the question of whether Congress authorized judicial enforcement of Member demands for information from executive branch agencies.

In *Waxman v. Thompson*,²⁷ a 2006 opinion of the District Court for the Central District of California, the plaintiffs, all minority members of the House Government Reform Committee, sought a court order pursuant to 5 U.S.C. §§ 2954 and 7211 — often times referred to as the “rule of seven” — granting them access to Department of Health and Human Services records related to the anticipated costs of the Medicare Prescription Drug and Modernization Act of 2003. The court, in dismissing the case for lack of jurisdiction, addressed the argument made by the plaintiffs that 5 U.S.C. § 2954, which requires that “[a]n Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof ... shall submit any information requested of it relating to any matter within the jurisdiction of the committee,” implicitly delegated to Members the right to sue to enforce their informational demands. The court, in rejecting this argument, relied on the Supreme Court’s holding in *Reed v. County Commissioners*. Specifically, the court noted that *Reed*’s holding “put Congress on notice that it was necessary to make authorization to sue to enforce investigatory demands explicit if it wished to ensure that such power existed.” According to the court, like the Senate resolution at issue in *Reed*, because § 2954 is silent with respect to civil enforcement it stands to reason that the Congress never intended to provide the Members with the power to seek civil judicial orders to enforce their document demands.

The argument that a mere one-house resolution is not sufficient to provide jurisdiction also derives support from the ruling in *Senate Select Committee on*

²⁷ *Waxman v. Thompson*, No. 04-3467, slip op. (C.D. Cal. July 24, 2006).

Presidential Campaign Activities v. Nixon,²⁸ a 1973 decision by the District Court for the District of Columbia. In *Senate Select Committee*, the court held that there was no jurisdictional statute available that authorizes the court to hear and decide the merits of the Committee’s request for a declaratory judgment, mandatory injunction, and writ of mandamus arising from President Nixon’s refusal to produce tape recording and other documents sought by the Committee pursuant to a *subpoena duces tecum*. In reaching its conclusion, the court addressed several potential bases for jurisdiction: 28 U.S.C. § 1345, United States as a Plaintiff; 28 U.S.C. § 1361, Action to Compel an Officer of the United States to Perform His Duty; 5 U.S.C. §§ 701-706, the Administrative Procedure Act; and, of particular relevance here, 28 U.S.C. § 1331, the federal question jurisdiction statute.

Focusing on 28 U.S.C. § 1331, the court noted that the statute at the time contained a minimum “amount in controversy” requirement of “\$10,000 exclusive of interest and costs.” The court stated that “[t]he satisfaction of a minimum amount-in-controversy is not a technicality; *it is a requirement imposed by Congress which the courts may not dispense with at their pleasure.*” Because the Select Committee could not establish a theory under which the amount in controversy requirement was satisfied, the court dismissed the case for lack of subject matter jurisdiction.

Senate Select Committee may still be cited for the proposition that, absent a specific congressional enactment, Congress may not seek to enforce a subpoena in federal court. It is important to note, however, that not only have subsequent cases held that “[w]here fundamental constitutional rights are involved, this court has been willing to find satisfaction of the jurisdictional amount requirement for federal question jurisdiction,”²⁹ but also that Congress specifically removed the amount in controversy requirement for federal question jurisdiction in 1980. Given these developments, combined with the reading of *Reed v. County Commissioners* suggested above, it appears possible to argue that a specifically authorized congressional committee may bring a civil action to enforce a subpoena using 28 U.S.C. § 1331 as a basis for federal question jurisdiction. Such an argument has been suggested by the district court in *Waxman v. Thompson*, the “rule-of-seven” case discussed above. According to the court in *Waxman*, the holdings of *Reed*, *Senate Select Committee* and *United States v. AT&T*³⁰ — a case involving the intervention by a House committee chairman into a lawsuit by the Department of Justice, which was attempting to enjoin compliance with a committee subpoena by AT&T — suggest that “legislative branch suits to enforce requests for information from the executive branch are justiciable *if authorized by one or both Houses of Congress.*” While we have found no instance where a committee of either the House or Senate has attempted to use this argument to enforce a subpoena, it appears to be consistent

²⁸ 366 F. Supp. 51 (D.D.C. 1973).

²⁹ *United States v. American Telephone & Telegraph Co.*, 551 F.2d 384, 389 (D.C. Cir. 1976) (citing *Committee for GI Rights v. Callaway*, 518 F.2d 466, 472-73 (1975)); *see also Greer v. Spock*, 424 U.S. 828 (1976)

³⁰ 567 F.2d 121

with both the plain meaning of the statute and a reasonable interpretation of the existing case law.

Although, as indicated, there have been no attempts by a House of Congress to seek civil enforcement of subpoenas in federal court authorized solely by resolution of a single House, there have been situations that appear to be closely analogous. On several occasions the House of Representatives has authorized, via House Resolution, the intervention by counsel representing a House Committee into civil litigation involving congressional subpoenas.

While some may still argue that a law passed by both Houses and signed by the President conferring jurisdiction is required, it may be plausibly argued that taken together, the combination of *Reed*'s requirement that congressional authorization to sue be by express language, the willingness of federal courts to accept properly authorized interventions, and the fact that the federal question jurisdiction statute no longer contains an amount in controversy requirement, suggest that if an authorization resolution by the House can be obtained there is a likelihood that a reviewing court will find no legal impediment to seeking civil enforcement of subpoenas or other committee orders.³¹

³¹ See CRS Contempt Report, *supra* note 8 at 37-46.